

February 5, 2009

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Tom Marks

Date of Filing: January 7, 2009

Case Number: TFA-0288

On January 7, 2009, Tom Marks (Appellant) filed an Appeal from a determination issued to him on November 26, 2008, by the National Nuclear Security Administration (NNSA) of the Department of Energy (DOE). In that determination, NNSA responded to a request for information the Appellant filed under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by the Department of Energy in 10 C.F.R. Part 1004. NNSA identified 17 documents responsive to the Appellant's request. NNSA provided the Appellant with seven of the documents in their entirety. The remaining ten documents were withheld in their entirety by NNSA under Exemptions 2 and 4 of the FOIA. The Appellant challenges NNSA's withholding of information under those Exemptions. This appeal, if granted, would require NNSA to release the withheld information to the Appellant.

I. Background

On September 10, 2007, the Appellant filed a request with NNSA for

1. FY00-FY08 "salary increase authorization" proposals submitted to LANL and/or the University of California on behalf of Las Alamos National Laboratory (LANL) to NNSA/DOE. These are also referred to as "compensation increase" plans or proposals.
2. DOE/NNSA "salary increase authorization" responses to LANL/University of California for FY00-FY08.
3. All [computer] "hot skills" requests or proposals submitted by LANL and/or the University of California on behalf of LANL to the NNSA/DOE after January 1, 1999.

4. All DOE/NNSA responses to the request and/or proposals as described in item 3, above, and all authorization for [computer] hot skills compensation to LANL/UC after January 1, 1999.

Determination Letter from Carolyn Becknell, NNSA, to Appellant, November 26, 2008, at 1.

On November 26, 2008, NNSA released copies of letters from DOE to the contractors approving the Compensation Increase Plans for FY 2000, 2001, 2002, 2004, 2005, 2006, and 2008. In its Determination Letter, NNSA stated that “[t]he remainder of the responsive records are withheld in their entirety pursuant to 5 U.S.C., Section 552(b)(2) (Exemption 2 for the FOIA) and 5 U.S.C. Section 552 (b)(4) (Exemption 4 of the FOIA).” Determination Letter at 2. NNSA then explained that federal courts have interpreted Exemption 2 to encompass “low 2” information and “high 2” information. *Id.* NNSA stated that the withheld portions constituted “high 2” information. *Id.* NNSA then explained what type of information is exempt from disclosure under Exemption 4 and that, in making its determination, it solicited and received comments from the submitters of the requested documents. NNSA went on to indicate that it attempted to segregate factual, nonexempt information from exempt information. However, NNSA determined that after segregation, the factual, nonexempt information would be so small in quantity as to make its release meaningless. Finally, NNSA determined that release of the information was not in the public interest.

On January 7, 2009, the Appellant appealed, contending that NNSA did not properly support its Exemption 2 and Exemption 4 withholdings. Appeal Letter received January 7, 2008, from Appellant to Director, OHA at 1-2. The Appellant also contends that NNSA did not identify the specific exemption for each redaction in the responsive information. *Id.* at 2. Finally, the Appellant contends that NNSA conducted a flawed analysis to determine if disclosure of the information was contrary to the public interest. *Id.*

II. Analysis

According to the FOIA, after conducting a search for responsive documents, an agency must provide the requester with a written determination notifying the requester of the results of that search and, if applicable, of the agency’s intentions to withhold any of the responsive information under one or more of the nine statutory exemptions to the FOIA. 5 U.S.C. § 552 (a)(6)(A)(i). The statute further requires that the agency provide the requester with an opportunity to appeal any adverse determination. *Id.*

An agency therefore has an obligation to ensure that its determination letters (1) adequately describe the results of searches, (2) clearly indicate which information was withheld, and (3) specify the exemption or exemptions under which information was withheld. *F.A.C.T.S.*, Case No. VFA-0339 (1997); *Research Information Servs., Inc.*, Case No.

VFA-0235 (1996) (RIS).^{1/} Generally a description is adequate if each document is identified by a brief description of the subject matter it discusses and, if available, the date upon which the document was produced and its author and recipient. An index of documents need not, however, contain information that would compromise the privileged nature of the documents. *State of New York*, Case No. TFA-0269 (2008). A determination must also adequately justify the withholding of documents by explaining briefly how the claimed exemption applies to the document. *Id.* Without an adequately informative determination letter, the requester must speculate about the adequacy and appropriateness of the agency's determinations. *RIS*.

A. Adequacy of the Determination

Our review of the Determination Letter indicates that NNSA failed to indicate which portions of the withheld documents were withheld pursuant to Exemption 2 and which portions were withheld pursuant to Exemption 4. Thus, an administrative appeal in this case, without additional information, is virtually impossible to consider. In cases where agencies do not provide an adequate determination with respect to a FOIA request, we usually remand the request to the agency with instruction to issue a new determination letter, so that the Appellant and our Office can understand the rationale for withholding the information. *See Steven C. Vigg*, Case No. TFA-0003 (2002). We will remand the matter to NNSA so that it can issue another determination and inform the Appellant which specific portions of the documents are being withheld pursuant to which Exemption and explain how Exemptions 2 and 4 apply to the withheld material in that document.

B. Adequacy of the Justification

Although we have already decided to remand the matter to NNSA, for the purposes of administrative efficiency we will address NNSA's application of Exemptions 2 and 4. An agency has a similar obligation to properly justify its withholding of documents under the FOIA. NNSA relied on Exemptions 2 and 4 to withhold the information that was responsive to the Appellant's request. We do not believe NNSA properly justified its application of either of these Exemptions.

Exemption 2 of the FOIA exempts from mandatory public disclosure records that are "related solely to the internal personnel rules and practices of an agency." 5 U.S.C. § 552(b)(2); 10 C.F.R. § 1004.10(b)(2). In the Determination Letter, NNSA stated that "[t]he Exemption 2 information that was deleted from these documents reveals the method by which [the information] is gathered and the proposals reflect LANL's methods and procedures for determining salary bands and staff compensation." Determination letter

^{1/}All OHA decisions issued after November 19, 1996 may be accessed at <http://www.oha.doe.gov/foia1.asp>.

at 3. LANL is a DOE contractor, not a government agency. Therefore, NNSA cannot use Exemption 2 to withhold information that would reflect LANL's procedures.

Similarly, NNSA misapplied the Exemption 4 standard to the withheld information. Exemption 4 exempts from mandatory disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. §552(b)(4); 10 C.F.R. § 1004.10(b)(4); *see also National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) (*National Parks*). There are a number of requirements that must be met for information to be withheld under Exemption 4. NNSA correctly stated the test outlined in *National Parks*, which includes that the information must be "commercial or financial," "obtained from a person," and "confidential." *National Parks* stated that withheld information is confidential if its release would be likely to either (a) impair the government's ability to obtain such information in the future or (b) cause substantial harm to the competitive position of submitters. *National Parks*, 498 F.2d at 770. NNSA then determined that release of the information would "undermine LANL's ability to continue to obtain this type of proprietary vendor information in the future." Determination Letter at 3. As stated above, LANL is a DOE contractor, not a government agency. Therefore, NNSA improperly considered the impact on LANL's ability to obtain information in the future in its justification for withholding information under Exemption 4.

C. Discretionary Public Interest Disclosure of the Withheld Information

The DOE regulations provide that the DOE should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and it is in the public interest. 10 C.F.R. § 104.1. With regard to the information withheld pursuant to Exemption 2, NNSA claimed the release of the information would risk either circumvention of a legal requirement or disruption of a critical operation or activity. If NNSA determines on remand that Exemption 2 still forms a basis for withholding information from responsive documents, it should reconsider whether the public interest nevertheless mandates its discretionary release. In cases involving material determined to be exempt from mandatory disclosure under Exemption 4, the usual inquiry into whether release of the material would be in the public interest is unnecessary. Disclosure of confidential information that an agency can withhold pursuant to Exemption 4 would constitute a violation of the Trade Secrets Act, 18 U.S.C. § 1905, and is therefore prohibited. *See, e.g., Chicago Power Group*, 23 DOE ¶ 80,125 at 80,560 (June 3, 1993) (Case No. LFA-0292).

III. Conclusion

For all the reasons stated above, we will remand the matter to NNSA for a new analysis and determination. Therefore, we will grant the Appeal in part and remand it to NNSA.

It Is Therefore Ordered That:

- (1) The Appeal filed by Tom Marks, Case No. TFA-0288, is hereby granted as specified in Paragraph (2) below and is denied in all other respects.
- (2) This matter is hereby remanded to the National Nuclear Security Administration of the Department of Energy, which shall issue a new determination in accordance with the instructions set forth in the above Decision.
- (3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review. Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

Poli A. Marmolejos
Director
Office of Hearings and Appeals

Date: February 5, 2009